Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-738

RICHARD J. STULL,

Petitioner,

against

NICHOLAS H. BAYARD, PAUL L. MILLER, HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR., individually and as Executors of the Estate of WILLIAM T. PIPER, Deceased, NICOLAS M. SALGO, DAVID W. WALLACE, BANGOR PUNTA CORPORATION and THE FIRST BOSTON CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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December 21, 1977.

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This brief is submitted jointly on behalf of the Respondents Howard Piper, Thomas F. Piper, William T. Piper, Jr., Bangor Punta Corporation ("Bangor Punta") and The First Boston Corporation ("First Boston") in opposition to the petition for a writ of certiorari.[1]

[1] These Respondents were the only parties served with process by Petitioner.

Statement of the Case

This purported class action arose out of the contest for control of Piper Aircraft Corporation ("Piper") which took place over eight years ago between Bangor Punta and Chris-Craft Industries, Inc. ("Chris-Craft"), which was the subject of a recent decision of this Court, *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977).

Petitioner, a Piper shareholder, did not tender his shares to either contestant and, on August 1, 1975, filed this action which seeks recovery on the theory that Respondents fraudulently dissuaded him and the class he purports to represent from accepting the exchange offer made by Chris-Craft in July 1969.

This is the third action concerning the Piper control contest brought by Petitioner as attorney for his wife Lillian Stull ("Lillian"), or as plaintiff. The history of this action and the two related actions prosecuted by Petitioner on behalf of Lillian is set forth in detail in the opinion of the district court. 424 F. Supp. 937-41 (App. A1-16).[2]

In summary, Petitioner commenced in February 1969 a derivative action on behalf of Piper with Lillian as the representative entitled *Stull* v. *Greene,* 69 Civ. 440 (S.D.N.Y.), which alleged that a cash tender offer made by Chris-Craft for 300,000 Piper shares at $65 per share was a "self-dealing operation" to acquire Piper shares "for less than fair value." Between 1969 and 1972, Petitioner filed no less than four amended complaints in *Stull* v. *Greene* alleging that Chris-Craft's tender and exchange offers to Piper shareholders were "grossly and unconscionably inadequate."

[2] References to the Appendices in the Petition will be cited in this manner.

In May 1972 Petitioner filed a class action with Lillian as the representative entitled *Stull* v. *Pool,* 72 Civ. 2055 (S.D.N.Y.). Contrary to the allegations in *Stull* v. *Greene,* Lillian claimed injury on the basis that the alleged class of non-tendering Piper shareholders was dissuaded from accepting the allegedly advantageous Chris-Craft exchange offer—the same offer Petitioner claimed was "grossly and unconscionably inadequate" in *Stull* v. *Greene.*

In April 1974, a motion to certify class status in *Stull* v. *Pool* was denied on the grounds that Lillian was not qualified to represent the proposed class because of her prior contradictory statements in *Stull* v. *Greene* and her potential conflict of interest resulting from Petitioner's financial interest in the action as attorney for the class.[3] The appeal from denial of class status was dismissed on October 8, 1974, and afterwards both *Stull* v. *Greene* and *Stull* v. *Pool* were settled by Lillian. (App. A9-12)

Although Petitioner was fully cognizant of the proceedings in his wife's action, he made no effort to intervene after class status was denied. Instead, on August 1, 1975, more than fifteen months after denial of class status in *Stull* v. *Pool* and more than six years after July 18, 1969 when the last alleged fraudulent act was committed by Respondents, Petitioner filed the instant action which is virtually identical to the class action he commenced as attorney on behalf of Lillian. Petitioner gives no legitimate reason, nor could there be one, for his not seeking to intervene as a party plaintiff in *Stull* v. *Pool.* (App. A11-12)

Petitioner moved to certify the class and also for partial summary judgment. Respondents cross-moved for summary judgment on several grounds and opposed the motion to certify the class. The district court dismissed the action and held that it was barred by the applicable New York

[3] *Stull* v. *Pool,* 63 F.R.D. 702, 704-05 (S.D.N.Y. 1974).

statute of limitations. 424 F. Supp. 937. The Court of Appeals for the Second Circuit unanimously affirmed. 561 F.2d 429.

Argument

The questions raised by the Petition are of limited interest and do not warrant review by this Court. The decision below is not in conflict with decisions of this Court or other courts of appeals, nor does this case involve an important undecided issue involving the administration of justice in the federal courts. The determination that Petitioner's action was barred by the New York statute of limitations involves the application of state law by a federal court. The question of whether the tolling rule in *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974), was applicable to this action, and, if applicable, was properly applied to the peculiar facts here presented, is of no significance beyond this case.

POINT I

Petitioner's action was time barred under New York law.

Petitioner concedes that the New York statute of limitations applied to this action. Although there were no cases directly in point, the courts below interpreted New York law and held that under the applicable state law provisions, New York CPLR § 203(f) and § 213(8), Petitioner's action was time barred because it was filed more than six years after Petitioner's cause of action accrued.[4] (App. A14-18; B5-11)

[4] *McConkey Realty Corp.* v. *Wildermuth,* 214 App. Div. 395, 397, 212 N.Y.S. 216, 217 (4th Dep't 1925); *Rickel* v. *Levy,* 370 F. Supp. 751, 755-56 (E.D.N.Y. 1974). *See Northrup* v. *Hill,* 57 N.Y. 351, 353-354 (1874); Practice Commentary C203:12, 7B *McKinney's Cons. Laws* 125, 127 (1976).

Petitioner asserts in substance that the courts below erred in determining when the cause of action accrued for purposes of applying the New York statute. Even if the argument had merit, which it does not, such an issue is not worthy of review by this Court.

POINT II

Petitioner failed to intervene in *Stull* v. *Pool* before the statute of limitations expired.

Petitioner argues that under the principles announced in *American Pipe* v. *Utah,* 414 U.S. 538 (1974), his class action, filed more than six years after the cause of action accrued, was not time barred.[5] Petitioner contends that the commencement of *Stull* v. *Pool* in May 1972 tolled the statute of limitations until April 1974 when class status was denied.

Class status was denied in *Stull* v. *Pool* solely on the ground that Lillian was not a proper representative of the purported class. Petitioner had actual notice that class status was denied and could have moved promptly to intervene. Indeed, at the time class status was denied, fifteen months remained before the six year statute of limitations expired as to Petitioner's claim. Yet, for his own inexplicable reasons, Petitioner waited until after the limitations period expired and then commenced another *class* action.

The considerations involved in tolling the statute of limitations where class status is denied on the ground of disqualification of the class representative have not been specifically addressed by this Court or the lower courts.[6]

[5] First Boston was not a party in *Stull* v. *Pool* and therefore Petitioner has no tolling argument as to it. *Arneil* v. *Ramsey,* 550 F.2d 774, 782 n.10 (2d Cir. 1977).

[6] This Court has discussed the principle of tolling in cases where class status was denied for lack of numerosity, *e.g., American Pipe,*

(footnote continued on following page)

However, in *American Pipe, supra,* this Court, recognizing that tolling is contrary to the general policy of ending litigation of stale claims and that Rule 23 of the Federal Rules of Civil Procedure was intended to limit the proliferation of actions, held that where class status was denied because of lack of numerosity, those members of the purported class who promptly moved to intervene in the existing action would receive the benefit of tolling (414 U.S. at 552-556). The courts below, with these same policy considerations present and in a situation where class action treatment might be appropriate, held that Petitioner should have intervened in *Stull* v. *Pool* when his wife was found to be disqualified and that by failing to do so, the benefits of tolling were not available to him as a potential class representative.

By requiring that a proposed new class representative intervene in the pending action, the district court through its discretionary powers under Rule 24(b) can assure that the continuance of the class action is consistent with the objectives of Rule 23 and the administration of justice.[7] However, if intervention were not required, there would be no effective limitations period since another Piper shareholder could commence still another class action if Petitioner were found not qualified to represent the class. Such a procedure would also result in a proliferation of class actions contrary to the primary object of Rule 23.

(footnote continued from preceding page)

supra; and *United Airlines, Inc.* v. *McDonald,* —— U.S. ——, 97 S.Ct. 2464, 2474 (1977); and where class status is granted and a member requests exclusion from the class, *e.g., Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 176 n.13 (1974).

[7] *See Monarch Asphalt Sales Co., Inc.* v. *Wilshire Oil Co. of Texas,* 511 F.2d 1073, 1078-80 (10th Cir. 1975); *Miller* v. *Central Chinchilla Group, Inc.,* 66 F.R.D. 411, 416-17 (S.D. Iowa 1975); *Goldstein* v. *Regal Crest, Inc.,* 62 F.R.D. 571, 578-580 (E.D. Pa. 1974); 3B *Moore's Federal Practice* ¶ 23.90, p. 23-1653 n.11 (1976-77 Supplement).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: December 21, 1977.

Respectfully submitted,

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Affidavit of Service

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

REX W. MIXON, JR., being duly sworn, deposes and says that, pursuant to Rule 33 of the Supreme Court Rules, he served the foregoing Joint Brief upon counsel of record for Petitioner by mailing on December 21, 1977, three true and correct copies thereof, first class mail postage prepaid, to Irving Bizar, Esq., 40 West 57 Street, New York, New York 10019.

Rex W. Mixon, Jr.

Sworn to before me this
21st day of December, 1977.

.....
Notary Public